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SMALL-HANDLES, BIG IMPACTS: WHEN SHOULD THE NATIONAL ENVIRONMENTAL POLICY ACT REQUIRE AN ENVIRONMENTAL IMPACT STATEMENT?

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I. INTRODUCTION

Consider the following hypothetical: a corporation plans to open wood-chipping installations throughout the southeastern United States. The installations will process trees and vegetation from thousands of acres of private forestland. The corporation will transport the wood-chips by barge and freighter to the eastern United States. The wood-chipping installations may affect the biological and climatological character of major portions of several southern states. The only federal permit needed by the corporation to go forward with the project is an Army Corps of Engineers (Corps) wharf-building permit for the barge-loading facility. Without the federal permit, the project will not take place. With the federal permit, the project will take place. The corporation can argue that since the barge wharf itself is minor, the National Environmental Policy Act (NEPA)[1] does not require the Corps to prepare an environmental impact statement (EIS).[2] The wood-chipping installation project considered as a whole, however, clearly would require an EIS. This situation exemplifies the classic "small-handle" problem.[3]

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[1] 42 U.S.C. §§ 4321–47 (1988).

[2] *See infra* note 15 and accompanying text.

[3] This hypothetical is taken from ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW AND SOCIETY 617 (1992).

This Comment explores the nature of the small-handle problem.[4] The ultimate question of the small-handle problem is whether an agency's initial determination of whether an EIS is necessary requires consideration of an entire project or merely of a piece of the project. Section II discusses the legislative history of NEPA and the administrative regulations from which federal agencies seek guidance in determining whether or not to prepare an EIS. Section III examines the methods various courts utilize in analyzing small-handle problems. Section IV examines decisions that employ two different methods of analysis in requiring developers to prepare a comprehensive EIS. In addition, Section IV examines how using the methods of analysis that are more likely to require a comprehensive EIS can help fulfill the national policy goals that NEPA established. Finally, this Comment concludes that agencies and courts should construe NEPA's EIS requirement to mandate consideration of projects in their entirety.

II. NEPA: The Legislative History, the Statute, and the Regulatory Guidelines

A. *The Legislative History of NEPA*

In January of 1970, President Nixon signed into law the National Environmental Policy Act of 1969.[5] The stated purpose of NEPA was to establish a comprehensive national environmental policy.[6] Congress enacted NEPA in response to the growing awareness of the interdependence between people and their environment.[7] In recognition of this interdependence, Congress was concerned with environmental harms resulting from technological advancements,[8] population growth,[9] and an overall degradation in environmental quality.[10]

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[4] "Small-handle" is a term generally used to refer to instances where the amount of federal involvement is arguably marginal, and the issue becomes whether or not a comprehensive EIS is required. *See* Daniel R. Mandelker, NEPA Law and Litigation, § 8.04(2) (2d ed. 1992 (Supp. 1995)).

[5] National Environmental Policy Act of 1969, Pub. L. No. 91–190 (codified as amended at 42 U.S.C. §§ 4321–47).

[6] 42 U.S.C § 4321.

[7] H.R. Rep. No. 378, 91st Cong., 1st Sess. 3 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2753 (1969).

[8] *Id.*

[9] S. Rep. No. 296, 91st Cong., 1st Sess. 5, 13 (1969).

[10] *Id.*

Proponents of NEPA urged that passage of NEPA was required to avert a national catastrophe.[11] Before NEPA, environmental problems were addressed only after reaching crisis proportions.[12] Senator Henry Jackson, (D-Wash.) the chairman of the Senate Interior and Insular Affairs Committee,[13] however, wanted NEPA to "prevent . . . environmental abuse and degradation caused by Federal actions before they got off the planning board."[14]

NEPA mandates that federal agencies prepare a "detailed statement . . . on the environmental impact" of any proposed "major Federal actions significantly affecting the quality of the human environment."[15] Initially, an agency must determine whether a proposed action triggers the EIS requirement.[16] An agency's determination of NEPA applicability is subject to judicial review.[17] NEPA's legislative history does not provide much insight into what constitutes "major Federal actions significantly affecting the quality of the human environment."[18] A report to the Senate by the Senate Committee on Interior and Insular Affairs emphasized that Congress intended NEPA to establish America's broad policy goals with respect to the environment.[19]

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[11] Terence L. Thatcher, *Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment Under the National Environment Policy Act*, 20 ENVTL. L. 611, 612 (1990).

[12] 115 CONG. REC. S40,416 (1969).

[13] 1969 Congressional Q. Almanac, Volume XXV, *Envtl. Qual. Council* 525, 525.

[14] 115 CONG. REC. S29,055 (1969); *see* Thatcher, *supra* note 11, at 612.

[15] 42 U.S.C. § 4332(2)(C)(i).

[16] *See id.* § 4332(2)(C); *see also* Valerie M. Fogelman, *Threshold Determinations Under the National Environmental Policy Act*, 15 B.C. ENVTL. AFF. L. REV. 59, 60 (1988).

[17] For a complete discussion of judicial review see generally Susannah T. French, *Judicial Review of the Administrative Record in NEPA Litigation*, 81 CAL. L. REV. 929 (1993).

[18] Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1319 (8th Cir. 1974) (referring generally to H.R. REP. No. 378, *supra* note 7 and S. REP. No. 296, *supra* note 9).

[19] *See, e.g.*, S. REP. No. 296, *supra* note 9, at 16. The Senate Report stated that "the unprecedented pressures of population and the impact of science and technology make a policy necessary today. The expression 'environmental quality' symbolizes the complex and interrelated aspects of one man's dependence upon his environment." *Id.*

The House Report, submitted to the House of Representatives by the Committee on Merchant Marine and Fisheries also took a broad view of the complex environmental issues. The House Report stated that:

> today we are manipulating an extremely complex system: The ecosystems of the earth, the units of the landscape, and we do not know the consequences of our actions until it is too late. We need to study ecosystems in advance and work out the strategies of living with the landscape.

H.R. REP. No. 378, *supra* note 7, at 2756.

NEPA's statutory language establishes broad national policy goals.[20] In short, the primary purpose of NEPA is to force agencies to consider the environmental impacts of their projects.[21] Another purpose of NEPA is to protect the integrity of federal agencies' decision-making process and to promote better-informed federal decisionmaking[22] by opening the process up to the public.[23] Indeed, regulations promulgated under NEPA by the Council of Environmental Quality (CEQ)[24] state that one of the policies of federal agencies must be to "encourage and facilitate public involvement in decisions which affect the quality of the human environment."[25] A final purpose of NEPA is the early identification of the environmental consequences of government action while understanding those consequences within a larger context.[26]

An agency's determination of whether an EIS must be prepared is significant for several reasons. First, the EIS process gives interested parties an opportunity to voice their concerns about projects in which the federal government is playing a part, and to require agencies to pay attention to and address these concerns.[27] Indeed, a federal agency preparing an EIS must obtain comments from other federal agencies that have special expertise on any of the proposed project's potential environmental impacts.[28] The agency preparing the EIS also must

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[20] 42 U.S.C. § 4331(a). NEPA states:

> it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Id.

[21] *See id.* § 4331(b).

[22] William B. Ellis & Turner T. Smith Jr., *The Limits of Federal Environmental Responsibility and Control Under the National Environmental Policy Act*, 18 ENVT. L. REP. 10,055, 10,058 (1988).

[23] *See, e.g.*, 40 C.F.R. § 1500.1(b) (1995). The CEQ regulations state that NEPA's "procedures must insure [sic] that environmental information is available to public officials and citizens before decisions are made and before actions are taken." *Id.*; *see also* Ellis & Smith, *supra* note 22, at 10,058 (noting that "NEPA's chief goal—promoting better informed decisionmaking—would seem to favor full disclosure of such significant environmental effects.").

[24] *See infra* notes 35–38 and accompanying text.

[25] 40 C.F.R. § 1500.2(d).

[26] Thatcher, *supra* note 11, at 612.

[27] *See* 40 C.F.R. §§ 1503.1(a)(3)–(4) (1995).

[28] *Id.* § 1503.1(a)(1).

request comments from any federal agency that is authorized to develop and enforce environmental standards.[29] In addition, an agency must solicit comments from other interested groups.[30] The issue of whether or not an agency must prepare an EIS is also significant because agency officials might pay less attention to the environmental effects of a project if the agency does not prepare an EIS.[31] Finally, an EIS should supply a cost/benefit analysis of a project, weighing project benefits against environmental harms.[32] In short, NEPA's EIS requirement does not mandate that a project be stopped if the environmental consequences of the project are severe.[33] Rather, Congress designed the EIS process to ensure that a federal agency at least consider the environmental consequences of a project and make an informed decision about whether or not a project should go forward only after weighing all information gathered preparing an EIS.[34]

B. *Statutory and Regulatory Guidelines under NEPA*

In addition to requiring that federal agencies prepare EISs, NEPA also established the CEQ.[35] The purpose of the CEQ is to review and evaluate federal government programs to determine how the programs contribute to the furtherance of a national environmental policy.[36] The CEQ also promulgated its own regulations, which provide guidance to federal agencies preparing EISs.[37] The United States Supreme Court has stated that the CEQ regulations are entitled to substantial deference.[38]

CEQ regulations provide both substantive and procedural guidelines for EIS preparation. The substantive guidelines help an

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[29] *Id.* § 1503.1(a)(2)(i).

[30] *See id.* § 1503.1(a)(2). The CEQ regulations direct that an agency shall request comments from Native American groups whose reservations may be affected. *Id.* § 1503.1(a)(2)(ii). In addition, an agency must request comments from other agencies that have requested statements on actions of the kind proposed. *Id.* § 1503.1(a)(2)(iii).

[31] Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985).

[32] *See id.*

[33] *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

[34] *See id.*; *Sierra Club*, 769 F.2d at 875.

[35] 42 U.S.C. § 4341.

[36] 40 C.F.R § 1515.2 (1995).

[37] *See id.* §§ 1500–08 (1995).

[38] Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (noting that the CEQ was created by NEPA, and NEPA mandated that the CEQ was responsible for reviewing and appraising programs and policies of the federal government in light of NEPA's policies).

agency determine whether the agency must prepare an EIS.[39] For instance, the CEQ regulations define several of the terms used in NEPA such as "significantly"[40] and "major Federal actions."[41] In addition, the CEQ regulations also establish guidelines for the scope of actions, alternatives, and impacts to be considered in an EIS.[42] In assessing the scope of an EIS, the CEQ regulations require an agency to consider three types of actions: connected actions,[43] cumulative actions,[44] and similar actions.[45] In addition, an agency preparing an EIS must consider three types of impacts or effects: direct impacts, indirect impacts, and cumulative impacts.[46] The CEQ

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[39] 40 C.F.R. §§ 1500–08.

[40] *Id.* § 1508.27. The CEQ regulations define the use of the term "significantly" to mean "considerations of both context and intensity." *Id.*

[41] *Id.* § 1508.18. The CEQ regulations define "major Federal actions" to include "actions with effects that may be major and which are potentially subject to Federal control and responsibility." *Id.* The regulations also state that "actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals." *Id.* § 1508.18(a).

[42] *Id.* § 1508.25.

[43] *Id.* § 1508.25(a)(1). The CEQ regulations define "connected actions" as actions which are "closely related." *Id.* The regulations go on to explain that:

> actions are connected if they automatically trigger other actions which may require environmental impact statements . . . cannot or will not proceed unless other actions are taken previously, simultaneously, or are interdependent parts of a larger action and depend on the larger action for their justification.

Id. §§ 1508.25(a)(1)(i)–(iii).

The CEQ regulations also mandate that an EIS consider three types of alternatives. *Id.* § 1508.25. A discussion of these alternatives is beyond the scope of this Comment.

[44] 40 C.F.R § 1508.25(a)(2). An EIS must consider cumulative actions when there are several concrete proposals pending before the agency that together potentially impact the environment. The Regulations define cumulative actions as actions "which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement." *Id.*; *see also* Thatcher, *supra* note 11, at 625.

[45] 40 C.F.R. § 1508.25(a)(3). Similar actions are actions "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequencies [sic] together, such as common timing or geography." *Id.*

[46] *Id.* § 1508.25(c). In assessing one particular proposal, the EIS must consider any anticipated impacts from the action as far as reasonably foreseeable in assessing the cumulative impact of the proposal. CEQ regulations define "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* § 1508.7.

The CEQ regulations state that effects and impacts as used in the regulations are synonymous. *Id.* § 1508.8(b). The regulations define direct effects as those that are "caused by the action and occur at the same time and place." *Id.* § 1508.8(a).

also has promulgated answers to questions commonly asked about NEPA.[47]

In addition to providing substantive guidelines, the CEQ regulations delineate the procedural steps an agency should follow when determining whether or not to prepare an EIS.[48] Initially, a federal agency may be required to prepare an environmental assessment (EA) of a project.[49] The CEQ regulations define an EA as a concise document that determines whether or not a more expansive EIS is required in light of available evidence and analysis.[50] If an agency concludes from an EA that no EIS is required, the agency must prepare a finding of no significant impact (FONSI).[51] If an agency determines that an EIS is required, the agency must prepare a preliminary draft EIS.[52] Before the final EIS is prepared, however, the agency must obtain comments on its draft EIS from certain federal agencies and may request comments on its draft EIS from other interested parties.[53]

Finally, CEQ regulations mandate that federal agencies also promulgate and comply with their own regulations and procedures to supplement those of the CEQ.[54] These internal regulations also provide some direction to federal agencies deciding whether or not to prepare

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Indirect effects are:

> caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects in air and water and other natural systems, including ecosystems.

Id. § 1508.8(b).

[47] *See generally Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations*, 46 Fed. Reg. 18,026 (1981). Examples include "[t]o what extent must an agency inquire into whether an applicant . . . will also need approval from another agency for the same proposal or some other related aspect of it?" *Id.* at 18,029, and "[h]ow should uncertainties about indirect effects of a proposal be addressed . . . ?" *Id.* at 18,031.

In *Sierra Club v. Marsh*, the United States Court of Appeals for the First Circuit referred to these questions to reject the argument of the Corps that promises to mitigate certain environmental impacts in the future means that the impacts are not significant. Sierra Club v. Marsh, 769 F.2d 868, 875 (1st Cir. 1985). The *Sierra Club* court also pointed out that the *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations*, *supra*, directed the Corps to consider the secondary impacts of a proposed project. *Id.* at 879.

[48] *See* 40 C.F.R. § 1501.4.

[49] *Id.* § 1501.4(b).

[50] *Id.* § 1508.9.

[51] *Id.* § 1501.4(e).

[52] *See id.* § 1502.9.

[53] *See supra* notes 28–30 and accompanying text.

[54] 40 C.F.R. § 1507.3(a).

an EIS. Each agency's internal regulations must establish specific criteria for typical actions that do not require an EIS, specific criteria for typical actions that do require an EIS, and specific criteria for typical actions that do require an EA but do not require an EIS.[55]

III. Judicial Resolution of Small-Handle Problems

The majority of courts that have considered a small-handle problem have not looked at a project as a whole.[56] Rather, these courts have looked only at that part of a project which requires a federal permit. Consequently, these courts have concluded that the portions of projects that require federal permits are not "major Federal actions significantly affecting the quality of the human environment."[57] Thus, more often than not, courts have not required a comprehensive EIS in small-handle situations.[58] A minority of courts, however, guided by the legislative history of NEPA and the CEQ regulations, have looked at small-handle projects as a whole and have required an EIS for the whole project.[59]

A. *The First Judicial Approach: Utilizing Either a Unitary or a Dual Standard of Analysis*

When first confronted with projects that arguably had minimal federal involvement, courts decided whether the phrase "major Federal actions significantly affecting the quality of the human environment" required a dual standard of analysis or a unitary standard of analysis.[60] The dual standard adopted by some courts involved an analysis of both the scope of federal involvement in the project and the significance of the project's environmental effects. Thus, federal

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[55] *Id.* § 1507.3(b)(2).

[56] *See* MANDELKER, *supra* note 4, § 8.04; *see, e.g.*, Sylvester v. United States Army Corps of Engineers, 884 F.2d 394, 400–01 (9th Cir. 1989); Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 273 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980); Save the Bay, Inc. v. United States Army Corps of Engineers, 610 F.2d 322, 327 (5th Cir.), *cert. denied*, 449 U.S. 900 (1980).

[57] *See, e.g.*, *Sylvester*, 884 F.2d at 400–01; *Winnebago Tribe of Nebraska*, 621 F.2d at 273; *Save the Bay*, 610 F.2d at 326.

[58] *See* MANDELKER, *supra* note 4, § 8.04; *see, e.g.*, *Sylvester*, 884 F.2d at 400–01; *Winnebago Tribe of Nebraska*, 621 F.2d at 273; *Save the Bay*, 610 F.2d at 327.

[59] Sierra Club v. Marsh, 769 F.2d 868, 881–82 (1st Cir. 1985); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1432, 1434 (C.D. Cal. 1985).

[60] *See, e.g.*, NAACP v. Medical Center, Inc., 584 F.2d 619, 626–27 (3d Cir. 1978); City of Davis v. Coleman, 521 F.2d 661, 673 n.15 (9th Cir. 1975); Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1321–22 (8th Cir. 1974).

involvement had to be major before courts would require an EIS.[61] In contrast to the dual standard, the unitary standard involved only the environmental harm component.[62] Courts adopting the unitary standard assumed that if a federal agency was involved in a project that was going to "significantly affect the quality of the human environment," the federal action should be considered major—"otherwise it would be possible to speak of a 'minor' federal action significantly affecting the quality of the human environment."[63]

Courts that adopted the dual standard of analysis relied on traditional methods of statutory analysis.[64] For example, in *NAACP v. Medical Center, Inc.*, a medical center that operated three hospitals planned to centralize hospital services and relocate much of the hospitals' facilities.[65] The medical center was required to receive approval from the United States Department of Health, Education, and Welfare (HEW).[66] Opponents of the centralization project charged that HEW violated NEPA because HEW issued an approval of a capital expenditure for the centralization project without first filing an EIS.[67] The United States Court of Appeals for the Third Circuit held that the dual standard of analysis was the appropriate approach because the dual standard of analysis followed the statutory language of NEPA more closely than did the unitary standard.[68] The court reasoned that to hold otherwise would give no effect to the word "major" in NEPA.[69] The court found that Congress may have concluded that an EIS should not be necessary when federal involvement in a project was minimal.[70] Thus, because mere approval of the capital expenditure was

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[61] *NAACP*, 584 F.2d at 626; *see* Scherr v. Volpe, 466 F.2d 1027, 1032–33 (7th Cir. 1972); Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

[62] *City of Davis*, 521 F.2d at 673 n.15 (noting that because court was adopting unitary standard of review, court confined its determination to whether defendants reasonably concluded that project would have no significant environmental effects).

[63] *Minnesota Pub. Interest Research Group*, 498 F.2d at 1321–22.

[64] *NAACP*, 584 F.2d at 627.

[65] *Id.* at 623.

[66] *Id.* The Center sought approval from the Department of Health, Education, and Welfare pursuant to § 1122 of the Social Security Act. *Id.*

[67] *Id.* at 624.

[68] *Id.* at 627.

[69] *NAACP*, 584 F.2d at 627.

[70] *Id.* In adopting the dual standard of analysis, the court pointed to the CEQ guidelines that recognized separate proof thresholds for "major" and "significant." *Id.* at 670. A noted NEPA commentator has observed that courts like *NAACP* that adopted the dual standard were influenced by earlier CEQ regulations that adopted a dual standard. *See* MANDELKER, *supra* note 4, § 8.06(2). The CEQ regulations now explicitly state that "[m]ajor reinforces but does not have a meaning independent of significantly." 40 C.F.R. § 1508.18.

not "major" federal action, the court upheld the decision of the United States District Court for the District of Delaware that an EIS was not required.[71]

Reasoning along similar lines, the United States Courts of Appeals for the Second[72] and Seventh Circuits[73] also adopted the dual standard. It is important to note, however, that in contrast to these courts, the CEQ regulations explicitly have adopted the unitary approach.[74] Jurisdictions that had adopted the dual approach were influenced by earlier versions of the CEQ regulations that had not adopted explicitly the unitary approach and, in general, those jurisdictions have not reconsidered their original decisions.[75]

In contrast, circuits that adopted a unitary standard of analysis relied on the purpose of NEPA to reach their position.[76] In *Minnesota Public Interest Research Group v. Butz*, the plaintiff requested a temporary and permanent injunction against logging in Boundary Waters Canoe Area (BWCA)—part of the Superior National Forest—until the Forest Service completed an EIS.[77] The defendants argued that because the logging operation was a result of pre-NEPA timber sales, no major federal action occurred since NEPA became effective and thus NEPA could not apply to the logging operation through retroactive application.[78] The United States Court of Appeals for the Eighth Circuit disagreed and in requiring an EIS,[79] adopted the unitary standard.[80]

In adopting the unitary standard, the court reasoned that the dual standard would not foster the purpose of NEPA.[81] Indeed, the court reasoned that under a dual standard of analysis, it would be possible to speak of a "minor" federal action significantly affecting the quality of the human environment and to hold that NEPA would not be applicable to such an action.[82] Such a result would defeat one of the

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[71] *NAACP*, 584 F.2d at 625.

[72] Hanly v. Mitchell, 460 F.2d 640, 644 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972).

[73] Scherr v. Volpe, 466 F.2d 1027, 1032–33 (7th Cir. 1972).

[74] 40 C.F.R. § 1508.18.

[75] *See* MANDELKER, *supra* note 4, § 8.06(2).

[76] *See, e.g.*, City of Davis v. Coleman, 521 F.2d 661, 673 n.15 (9th Cir. 1975); Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1321–22 (8th Cir. 1974).

[77] *Minnesota Pub. Interest Research Group*, 498 F.2d at 1317.

[78] *Id.* at 1317, 1318.

[79] *Id.* at 1323.

[80] *Id.* at 1321–22.

[81] *Id.*

[82] *Minnesota Pub. Interest Research Group*, 498 F.2d at 1321–22.

primary purposes of NEPA—to prevent a federal agency from isolating a project from the project's impact on the environment.[83] In this case, the logging activity would significantly affect the quality of the human environment.[84] In addition, a federal agency—the Forest Service—participated in the timber sales subsequent to NEPA's effective date.[85] Therefore, the court used the unitary standard to require the Forest Service to prepare an EIS.[86]

The United States Court of Appeals for the Ninth Circuit also adopted the unitary approach in *City of Davis v. Coleman*.[87] In *City of Davis*, a federal agency had supplied funding for a joint state and federal project to build a freeway interchange.[88] Opponents of the project argued that the Federal Highway Administration should prepare an EIS.[89] The United States District Court for the Eastern District of California dismissed the plaintiffs' NEPA claims, reasoning that the plaintiffs did not have standing to bring the claims.[90] The United States Court of Appeals for the Ninth Circuit reversed the district court's decision, ruling that the plaintiffs did have standing, and considered the plaintiffs' NEPA claims.[91] Quoting the language in *Minnesota Public Interest Research Group v. Butz*, where the United States Court of Appeals for the Eighth Circuit reasoned that the unitary standard would foster the purposes of NEPA, the court in *City of Davis* decided to review the case using a unitary standard.[92] Thus, because the project may have had significant environmental effects, the court considered the action to be "major." Therefore, the court required the agency to prepare an EIS.[93]

The unitary approach apparently does not require a court to assess how "major" the federal involvement in the project is, as long as the project significantly affects the quality of the human environment. Indeed, under the unitary approach, the statute could be rewritten to say "every federal action significantly affecting the quality of the

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[83] *Id.* at 1322.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 1323.

[87] City of Davis v. Coleman, 521 F.2d 661, 673 n.15 (9th Cir. 1975).

[88] *Id.* at 665–66.

[89] *Id.* at 666.

[90] *Id.*

[91] *See id.* at 671, 673.

[92] *City of Davis*, 521 F.2d at 673, n.15; *see also* Minnesota Pub. Interest Research Group v. Butz, 498 F.2d 1314, 1321–22 (8th Cir. 1974).

[93] *City of Davis*, 521 F.2d at 677.

human environment."[94] Thus, the decision to use a unitary standard of analysis instead of a dual standard of analysis seems to solve the small-handle problem. Jurisdictions adopting a unitary standard probably would require a comprehensive EIS when confronted with a small-handle problem while jurisdictions adopting a dual standard of analysis, when similarly confronted, would not require an EIS. Because the CEQ regulations now explicitly adopt a unitary standard of analysis, courts presently considering a small-handle problem would be likely to utilize the unitary standard and require a comprehensive EIS.[95]

B. *The Second Judicial Approach: Whether or Not a Project Has Been "Federalized"*

Although application of the more prevalent unitary analysis to small-handle problems should lead to requiring an EIS, most courts—even courts using a unitary analysis—have asked first whether the federal action in the project is sufficient to "federalize" the entire project.[96]

Courts asking whether a project has been sufficiently "federalized" interpret NEPA as having a separate and identifiable statutory requirement that an action be federal.[97] Under this analysis, a federal agency may be involved in a project without preparing an EIS. The threshold inquiry, however, is whether the federal participation is so significant to the project as a whole—including the nonfederal pieces of the project—to "federalize" the whole project. Only if the project as a whole has been "federalized" must the court determine whether the action is major or significant, depending on the jurisdiction's adoption of a unitary or dual standard of analysis.[98]

Courts that consider federalization as a separate threshold question reason that an EIS is necessary only if the federal agency has taken an action authorizing a nonfederal entity to undertake a project.[99] Courts reason that a project with both federal and nonfederal parts can become entirely federalized when the federal agency has enabled the nonfederal entity to act.[100]

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[94] *See supra* note 63 and accompanying text.
[95] *See supra* notes 74–75 and accompanying text.
[96] *See infra* notes 104–84 and accompanying text.
[97] MANDELKER, *supra* note 4, § 8.04.
[98] *See id.* § 8.06.
[99] *See id.* § 8.04(2).
[100] *Id.*

A project is clearly federalized when the nonfederal portions of the project require federal action before legally going forward.[101] Although federal action legally authorizing a project is sufficient to federalize a project, such legal authorization is not necessary to federalize a project.[102] Whether a project has been sufficiently "federalized" is less clear, however, when the federal action is not a legal requirement for the project, but the federal agency arguably has de facto control over the fate of a project so that opponents of the project can argue, in good faith, that the project will not go forward without agency approval.[103]

In the context of small-handle problems, courts have utilized different standards to determine whether federal action which does not provide the legal authorization to a project but which does facilitate nonfederal action is sufficient to federalize the entire project.[104] Although the language that courts use to describe the different standards varies, all of these tests essentially examine, in varying degrees, the nexus between the federal and nonfederal pieces of a project.[105] Some courts purport to focus on whether parts of the project are interdependent or merely serve complementary functions.[106] Other courts focus on whether the federal agency has sufficient "but-for" factual control over the project.[107] More recently, courts have expressed the idea that the nexus between the federal and nonfederal

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[101] *See, e.g.*, Greene County Planning Bd. v. Federal Power Comm'n, 455 F.2d 412, 418 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972) (action at issue was construction of high voltage electrical transmission line that required federal construction permit under § 4(c) of the Federal Power Act).

[102] Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980) (noting that statute at issue—§ 10 of the Clean Water Act—could not be construed as a grant of legal control over entire project); Save the Bay, Inc. v. United States Corps of Engineers, 610 F.2d 322, 327 (5th Cir.), *cert. denied*, 449 U.S. 900 (1980) (noting that court was not holding that requisite federal action must be condition precedent to private action in order for preparation of EIS to be required).

[103] *See, e.g., Winnebago Tribe of Nebraska*, 621 F.2d at 272; *Save the Bay*, 610 F.2d at 327; Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1428 (C.D. Cal. 1985).

[104] A respected NEPA commentator has approved of making the threshold inquiry whether or not the federal involvement has federalized the entire project. *See* MANDELKER, *supra* note 4, § 8.04(2). Because the various tests utilized by different courts are similar, Professor Mandelker has described the approach taken by most courts in determining whether or not the project has been sufficiently federalized as a "substantial contribution" rule, requiring that the federal agency make a substantial contribution to the action to be carried out by the nonfederal entity. *Id.* According to Professor Mandelker, marginal federal involvement in a project is not sufficient to bring the project within the scope of NEPA. *Id.*

[105] *See infra* notes 109–84 and accompanying text.

[106] *See* Enos v. Marsh, 769 F.2d 1363, 1372 (9th Cir. 1985).

[107] *See Save the Bay*, 610 F.2d at 327.

pieces of a project must be sufficient so that the pieces constitute "links-in-the same bit of chain."[108] Each of these courts have ignored the unitary standard of analysis as a way of resolving small-handle problems, even though many other courts and the CEQ regulations have adopted the unitary standard.

1. Whether the Parts of a Project are Interdependent or Merely Serve Complementary Functions

When confronted with a small-handle problem, some courts have considered whether the part of the project not requiring a federal permit is dependent on the part of the project that does require a federal permit. If the parts of the project are interdependent, rather than merely complementary, a comprehensive EIS will be required.[109] For example, in *Port of Astoria v. Hodel*, a private corporation sought to build an aluminum reduction plant.[110] The Bonneville Power Administration, a federal agency, contracted to supply power to the project.[111] Therefore, the United States Court of Appeals for the Ninth Circuit held that because the federal agency enabled the private portion of the project to take place, the private portion of the project and the federal agency's contributions were interdependent.[112] Thus, the entire project was sufficiently federalized, and the court required a comprehensive EIS that considered both the plant and the power lines that were to supply the power.[113]

If the part of the project that requires a federal permit and the part of the project that does not require a federal permit merely serve complementary functions, the agency will not have to prepare an EIS considering the project in its entirety.[114] For example, in *Enos v. Marsh*, Congress had authorized the construction of a deep draft harbor.[115] The Army Corps of Engineers (Corps) prepared an EIS.[116] Plaintiffs challenged the adequacy of the EIS, arguing that the Corps had violated NEPA by failing to discuss the environmental effects of

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[108] Sylvester v. United States Army Corps of Engineers, 884 F.2d 394, 400 (9th Cir. 1989); *see* Ringsred v. Duluth, 828 F.2d 1305, 1308 (8th Cir. 1987).

[109] *See* Port of Astoria v. Hodel, 595 F.2d 467, 477 (9th Cir. 1979); Sierra Club v. Hodel, 544 F.2d 1036, 1044 (9th Cir. 1976).

[110] *Port of Astoria*, 595 F.2d at 471.

[111] *Id.*

[112] *Id.* at 477.

[113] *Id.*

[114] *See* Enos v. Marsh, 769 F.2d 1363, 1371–72 (9th Cir. 1985).

[115] *Id.* at 1366.

[116] *Id.*

state-planned shoreside facilities that would be built because of the harbor project.[117] The plaintiffs argued that the shoreside facilities were so "functionally interdependent" that the project constituted a single federal action.[118] The United States Court of Appeals for the Ninth Circuit, however, ruled that although the deep harbor and the shoreside facilities served complementary functions, the two projects were distinct.[119] As a result, the court concluded that the construction of the facilities was not a "federal" action that had to be considered in an EIS.[120] Such a result, however, ignored the inevitable environmental effects of the shoreside facilities attendant to the deep harbor project.

2. The "But-For" Test

The "but-for" test utilized by some courts to determine whether a project has been sufficiently federalized also considers the nexus between the nonfederal and federal portions of the project.[121] Only if the federal portion of the project is sufficiently critical to the nonfederal portion of the project would the nexus between the two be sufficient to federalize the entire project.[122] If a court utilizing the but-for test does not deem a federal portion of the project sufficiently critical to the nonfederal portion of the project, the court does not require a comprehensive EIS.[123] The United States Courts of Appeals for the Fifth and Eighth Circuits used a but-for analysis to determine whether or not projects were sufficiently federalized, even though both of those jurisdictions earlier had adopted the unitary standard.[124] In *Winnebago Tribe of Nebraska v. Ray*, the Nebraska Public Power District planned to construct a power line that would cross the Missouri River and run through the Winnebago Indian Reservation.[125] Because the power line would cross the Missouri River, a permit from

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[117] *Id.* at 1371.

[118] *Id.*

[119] *Enos*, 769 F.2d at 1371.

[120] *Id.* at 1372. The court also noted that the shoreside facilities were completely state funded and the federal government exercised no control over the planning and developing of the facilities. *Id.*

[121] *See* Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980); Save the Bay, Inc. v. United States Army Corps of Engineers, 610 F.2d 322, 327 (5th Cir.), *cert. denied*, 449 U.S. 900 (1980).

[122] *See, e.g., Winnebago Tribe of Nebraska*, 621 F.2d at 272–73; *Save the Bay*, 610 F.2d at 326–27.

[123] *See, e.g., Winnebago Tribe of Nebraska*, 621 F.2d at 273; *Save the Bay*, 610 F.2d at 326–27.

[124] *Winnebago Tribe of Nebraska*, 621 F.2d at 272.

[125] *Id.* at 270.

the Corps was required.[126] The Corps concluded that an EIS was not required, although plaintiffs argued that the Corps should have considered the impact of the entire transmission line.[127] In determining whether or not the Corps had but-for factual control requiring project-wide analysis, the Eighth Circuit adopted a three-pronged test.[128] In this test, the court considered:

> (1) the degree of discretion exercised by the agency over the federal portion of the project; (2) whether the federal government had given any direct financial aid to the project; and (3) whether the overall federal involvement with the project was sufficient to turn essentially private action into federal action.[129]

Applying this three-pronged test, the court concluded that no EIS was required.[130] First, the court noted that the Corps had no discretion outside of its authority, which was limited to areas in and affecting navigable waters.[131] In addition, the court noted that there was no federal funding for the project.[132] Finally, giving no reasons, the court held that the fact that part of the line crossed the Missouri River did not turn the private action into federal action.[133] The court thus concluded that the Corps did not have to consider the environmental impact of the entire transmission line.[134] Interestingly, however, in adopting the three-pronged but-for test, the court cited *NAACP v. Medical Center, Inc.* as precedent.[135] The United States Court of Appeals for the Third Circuit in *NAACP* utilized a similar three-pronged test after concluding that the dual standard of analysis was appropriate, a standard that has been rejected by the CEQ regulations.[136]

The United States Court of Appeals for the Eighth Circuit also used the three-pronged but-for approach in the 1987 case of *Ringsred v. Duluth.*[137] In *Ringsred*, a Native American group had purchased a

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[126] *Id.*

[127] *Id.* at 270, 272.

[128] *Id.* at 272.

[129] *Winnebago Tribe of Nebraska*, 621 F.2d at 272.

[130] *Id.* at 273.

[131] *Id.* at 272. The Tribe argued that the Corps's amended regulations made the grant of a § 10 permit a *per se* major federal action. *Id.*

[132] *Id.* at 273.

[133] *Id.*

[134] *Winnebago Tribe of Nebraska*, 621 F.2d at 273.

[135] *Id.* at 272–73.

[136] NAACP v. Medical Center, Inc., 584 F.2d 619, 627, 629 (3d Cir. 1978); *see also supra* note 74 and accompanying text.

[137] Ringsred v. Duluth, 828 F.2d 1305, 1308 (8th Cir. 1987).

building and then transferred the building to the United States to be held in trust and made part of an Indian reservation.[138] The group converted the building into a gaming facility and leased the building to a commission established by the City of Duluth and the group.[139] The City of Duluth had purchased land next to the gaming facility in order to build a parking ramp that would be leased to the commission.[140] When the land was transferred to the United States, the Secretary of the Interior issued an EA which concluded that actions regarding the gaming facility would not have a significant impact on the environment.[141] Opponents of the project argued that the proposed parking ramp should have been considered when the Secretary of the Interior prepared an EA regarding the acquisition of the building.[142] The court, however, concluded that although the Secretary of the Interior had factual veto power over the proposed parking ramp, that action was not significant enough to establish major federal action.[143] While the Secretary of the Interior had approved a contract concerning the ramp, the court noted that the Bureau of Indian Affairs did not consider such approval necessary.[144] In addition, the federal government provided no money to the project.[145] Thus, the court concluded that the Secretary's approval of the contracts did not federalize the entire project, and no EIS considering the impact of the parking ramp was required.[146]

The United States Court of Appeals for the Fifth Circuit also seemed receptive to adopting a but-for test in *Save the Bay, Inc. v. United States Army Corps of Engineers*.[147] In *Save the Bay*, developers sought to build a manufacturing facility.[148] The developers sought a permit to construct a pipe that would carry wastewater from the manufacturing facility and discharge wastewater into marshlands and the Bay of St. Louis.[149] The Corps determined that only the pipe was subject to its jurisdiction, prepared a statement of finding regarding

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[138] *Id.* at 1306.
[139] *Id.*
[140] *Id.*
[141] *Id.* at 1307.
[142] *Ringsred*, 828 F.2d at 1307.
[143] *Id.* at 1308.
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] 610 F.2d 322 (5th Cir.), *cert. denied*, 449 U.S. 900 (1980).
[148] *Id.* at 323.
[149] *Id.* at 323–24.

the impact of the pipe, and issued a permit to the developer.[150] Opponents of the project, however, protested that the Corps's findings should consider the impact of the manufacturing facility as well as that of the pipe and argued that but-for the pipe to carry the wastewater, the project could not go forward.[151] The opponents thus argued that the entire project should be taken into account in assessing potential environmental impacts.[152] The Fifth Circuit, disagreeing with the project opponents' interpretation of a but-for test, stated that the pipeline itself was not critical to the operation of the plant.[153] Indeed, the Fifth Circuit reasoned that for a federal portion of a project to be critical to the nonfederal portion of a project, a developer must be unable to use alternative technologies that could circumvent the need for a federal permit.[154] In this case, the court believed that at least one method other than a pipeline could be used to transport the wastewater.[155] The court went on to state that more federal involvement than the mere issuance of the permit must exist in order to require a comprehensive EIS in this case.[156] Indeed, the mere issuance of a permit was an insufficient nexus between the Corps and the construction of the plant to federalize the whole project.[157]

3. "Links-in-the Same Bit of Chain"

Apparently agreeing with the decisions in *Save the Bay*,[158] *Winnebago Tribe of Nebraska v. Ray*,[159] and *Ringsred v. Duluth*,[160] in 1984 the Corps amended its internal regulations to adopt officially a test similar to the but-for analysis that the Corps would apply to determine whether a project had been sufficiently federalized.[161] The new regulations limited the scope of the Corps's jurisdiction to the feder-

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[150] *Id.* at 324.

[151] *Id.* at 327.

[152] *Save the Bay*, 610 F.2d at 327.

[153] *Id.*

[154] *See id.*

[155] *Id.*

[156] *Id.*

[157] *Save the Bay*, 610 F.2d at 327.

[158] *Id.*

[159] 621 F.2d 269, 273 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980).

[160] 828 F.2d 1305, 1308 (8th Cir. 1987).

[161] *See* Sylvester v. United States Army Corps of Engineers, 884 F.2d 394, 398 (9th Cir. 1989); *see also* Ellis & Smith, *supra* note 22, at 10,061. Under the Clean Air Act, the Environmental Protection Agency (EPA) must approve all proposed changes to the internal regulations of the United States Army Corps of Engineers. *See* 42 U.S.C. § 7609(a) (1988). However, because the EPA administrator did not approve of the changes, the changes were referred to the CEQ, which approved the new regulations. *Sylvester*, 884 F.2d at 398.

ally controlled or regulated aspects of whole projects.[162] Indeed, the new regulations separated the private aspects of a project from the federal aspect of a project in most cases when a Corps's permit was needed only for a portion of the project.[163]

The Corps's new regulations were challenged in *Sylvester v. United States Army Corps of Engineers*.[164] In upholding the new regulations, the United States Court of Appeals for the Ninth Circuit adopted the "links-in-the same bit of chain" method of analysis to determine whether a project has been sufficiently federalized.[165] In *Sylvester*, a developer planned to build a resort complex including a resort village, skiing facilities, and a golf course.[166] The developer planned to build the golf course on a meadow that included eleven acres of wetlands.[167] Because the developer would have to fill in the wetlands to build the golf course, a permit from the Corps was necessary.[168] The Corps believed that it only possessed jurisdiction over the wetlands, and therefore considered only the impact of filling in the wetlands.[169] After imposing several conditions on the developer, the Corps issued the permit and an EA, concluding that an EIS was unnecessary.[170] The plaintiffs sought an injunction, arguing that the golf course and the resort complex were connected actions. The plaintiffs argued that the Corps had unduly narrowed the scope of inquiry to the golf course alone, rather than assessing the entire resort complex.[171]

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[162] *Sylvester*, 884 F.2d at 398.

[163] Ellis & Smith, *supra* note 22, at 10,061. The new regulations required that a district engineer establish the scope of an EA or the EIS, and address the impact of portions of the project over which the district engineer has "sufficient control and responsibility to warrant Federal review." In determining whether sufficient "control and responsibility" exists, the Corps's regulations directed that the district engineer consider:

> (i) [W]hether or not the regulated activity comprises "merely a link" in a corridor type project (e.g., a transportation or utility transmission project).
>
> (ii) [W]hether there are aspects of the upland facility in the immediate vicinity of the regulated activity which affect the location and configuration of the regulated activity.
>
> (iii) [T]he extent to which the entire project will be within Corps jurisdiction.
>
> (iv) [T]he extent of cumulative Federal control and responsibility.

Sylvester, 884 F.2d at 398–99, quoting 53 Fed. Reg. 3120, 3135 (1988) (to be codified at 33 C.F.R. § 325).

[164] *See Sylvester*, 884 F.2d at 399–400.

[165] *See id.* at 399, 401.

[166] *Id.* at 396.

[167] *Id.*

[168] *Id.*

[169] *Sylvester*, 884 F.2d at 396.

[170] *Id.* at 396–97.

[171] *Id.* at 397.

In reviewing the Corps's decision, the court upheld the Corps's regulations and adopted the "links-in-the same bit of chain" analysis suggested by the Corps's new regulations.[172] The court noted that unless the regulations interpreting NEPA were contrary to the express intent of Congress, the court must defer to the agency's interpretation of NEPA.[173] In response to the argument that the Corps's regulations were contrary to the broad mandate of NEPA, the court stated that even expansive language has some limits.[174] Moreover, the court stated that NEPA did not specify the scope of analysis that federal agencies must use in determining whether actions that require agency approval, when combined with private actions, fall within NEPA's requirements.[175] In addition, the court rejected the argument that the Corps's regulations conflicted with CEQ regulations which provide that an agency cannot break down an action into smaller parts to avoid the EIS requirement.[176] In rejecting this argument, the court employed the "links-in-the same bit of chain" method of analysis suggested in the Corps's regulations to determine whether the development project had been sufficiently federalized.[177]

To explain the "links-in-the same bit of chain" analysis, the court analogized to "scattered bits of broken chain."[178] Continuing with the analogy, the court noted that "[s]ome segments . . . contain numerous links, while other segments have only one or two [links]. Each segment stands alone, but each link within each segment does not."[179] Links in the same segment would be connected actions, and thus a court would require a comprehensive EIS.[180] Different segments, however, would stand alone, and a court would not require a comprehensive EIS.[181] Links would be considered parts of the same segment if one link could not exist without the other.[182] Applying this analysis to the case at hand, the court held that the golf course and the rest of the resort were not two links of the same segment of chain because

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[172] *Id.* at 400.
[173] *Id.* at 399.
[174] *Sylvester*, 884 F.2d at 399.
[175] *Id.*
[176] *Id.* at 400.
[177] *Id.*
[178] *Id.*
[179] *Sylvester*, 884 F.2d at 400.
[180] *See id.*
[181] *See id.*
[182] *See id.*

other resort developments existed without golf courses.[183] Thus, the court ruled that the need for a permit did not "federalize" the entire project and the court did not require a comprehensive EIS.[184]

IV. Fulfilling NEPA's Goals: Requiring a Comprehensive EIS

NEPA established broad national policy goals and NEPA's legislative history and the CEQ regulations indicate that NEPA should require comprehensive EISs in the context of small-handle problems in order for these policy goals to be fulfilled.[185] Requiring a comprehensive EIS for small-handle problems fulfills NEPA's goals by forcing agencies to consider the environmental impacts of their projects.[186] In addition, requiring a comprehensive EIS for small-handle problems protects the integrity of the decision-making process.[187] These goals of NEPA can be achieved either by utilizing the unitary standard of analysis when confronted with a small-handle problem or by utilizing theories of indirect effects.

A. *Against the Trend: Two Cases that Required a Comprehensive EIS*

Despite the goals envisioned by Congress when Congress passed NEPA,[188] the current judicial trend apparently rejects use of a small handle to require an EIS for an entire project. The environmental effects of these projects, however, may be significant. For example, in *Winnebago Tribe of Nebraska v. Ray*, the plaintiffs argued that power lines could do substantial harm to bald eagles, a species pro-

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[183] *Id.*

[184] *Sylvester*, 884 F.2d at 401.

[185] *See supra* notes 11–47 and accompanying text. Commentators have split on the approach that courts should take when confronted with the small-handle problem. Some commentators have noted that to interpret NEPA broadly would overstep the legislation. Ellis & Smith, *supra* note 22, at 10,058, 10,061; David J. Hayes & James A. Hourihan, *NEPA Requirements for Private Projects*, 13 B.C. Envtl. Aff. L. Rev. 61, 63 (1985). A respected professor has written that Congress intended NEPA to be a "toothless tiger," with few substantive requirements. Plater, *supra* note 3, at 599. Other commentators have argued that only by requiring comprehensive EISs can NEPA's statutory mandate be fulfilled. Patrick A. Parenteau, *Small Handles, Big Impacts: When Do Corps Permits Federalize Private Development?*, 20 Envtl. L. 747, 756 (1990); Thatcher, *supra* note 11, at 612–13.

[186] *See supra* note 21 and accompanying text.

[187] *See supra* notes 22–25 and accompanying text.

[188] *See supra* notes 20–26 and accompanying text.

tected under the Endangered Species Act.[189] In *Save the Bay, Inc. v. United States Army Corps of Engineers*, a pipeline was to carry approximately two million gallons per day of industrial wastewater to the Bay of St. Louis.[190]

In light of both NEPA's goals and the significant environmental impacts of small-handle projects, two courts have required a comprehensive EIS when confronted with a small-handle problem.[191] One court that required a comprehensive EIS returned to the unitary/dual standard of analysis debate that other courts seemed to have dismissed as irrelevant.[192] Another court that required a comprehensive EIS considered the effects of the nonfederal portion of the project as secondary effects of the federal action that must be considered in an EIS.[193]

1. Against the Trend: Using the Unitary Standard to Require a Comprehensive EIS

Although most courts implicitly have rejected the unitary standard of analysis when confronted with a small-handle problem, utilizing the unitary approach is a logical way of analyzing a small-handle problem.[194] The United States District Court for the Central District of California resolved the small-handle problem by focusing on the unitary/dual standard debate.[195] In *Colorado River Indian Tribes v. Marsh*, developers planned to build a 156-acre residential and commercial development on the west side of the Colorado River.[196] Because the development was to run along the west side of the Colorado River, the developers proposed to stabilize the west shore of the Colorado River by placing riprap[197] along the riverbank.[198] The developers had to obtain a permit from the Corps in order to stabilize the river

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[189] Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 274 (8th Cir.), *cert. denied*, 449 U.S. 836 (1980).

[190] Save the Bay, Inc. v. United States Army Corps of Engineers, 610 F.2d 322, 323–24 (5th Cir.), *cert. denied*, 449 U.S. 900 (1980).

[191] Sierra Club v. Marsh, 769 F.2d 868, 881–82 (1st Cir. 1985); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1431 (C.D. Cal. 1985).

[192] *Colorado River Indian Tribes*, 605 F. Supp. at 1431–32.

[193] *Sierra Club*, 769 F.2d at 881–82.

[194] *See infra* notes 215–27 and accompanying text.

[195] *Colorado River Indian Tribes*, 605 F. Supp. at 1431.

[196] *Id.* at 1428.

[197] Riprap is broken stones loosely assembled in water or on soft ground as a foundation.

[198] *Colorado River Indian Tribes*, 605 F. Supp. at 1431.

bank.[199] Without the permit, the local county board would not approve the development.[200] The Corps reasoned that the scope of its jurisdiction was limited to the river and its banks.[201] Thus, even though the Corps had prepared a draft EIS, the Corps retracted the draft EIS and decided that it did not have to prepare an EIS.[202]

In resolving the small-handle problem, the court did not look first at whether the need for the permit for the riprap federalized the entire project.[203] Clearly, there existed federal involvement in a portion of the project.[204] Instead of analyzing whether federal involvement federalized the whole project,[205] the court noted that because the project involved federal action and the project as a whole had significant impacts, the unitary standard was appropriate and the project required an EIS.[206]

The court began its analysis by considering the unitary approach utilized in *City of Davis v. Coleman*.[207] In addition, the court opined that the rulings in *Save the Bay, Inc. v. United States Army Corps of Engineers* and *Winnebago Tribe of Nebraska v. Ray* conflicted with courts which had adopted the unitary approach.[208] Moreover, in utilizing the unitary standard of analysis to resolve the small-handle problem, the court looked at the CEQ regulations and NEPA's purpose.[209] Under a unitary approach to NEPA, the term "major Federal action" is not independent from the element of "significantly affecting the quality of the human environment."[210] The court reasoned that this approach was supported by the CEQ regulations which define "major Federal actions" to include "actions with effects that may be major

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[199] *Id.*

[200] *Id.*

[201] *Id.* at 1432.

[202] *Id.* at 1428.

[203] *See Colorado River Indian Tribes*, 605 F. Supp. at 1430–31.

[204] That there must be some federal involvement in the project is not disputed. Two commentators reason that there are two reasons why Congress intended NEPA to apply only to federal actions. The first reason is that NEPA was followed by a series of laws establishing comprehensive environmental regulatory programs which were targeted at the private sector. Secondly, the commentators reason that the procedures mandated by NEPA are not workable for decentralized decision-making structures like the federal government. Ellis & Smith, *supra* note 22, at 10,056.

[205] *See Colorado River Indian Tribes*, 605 F. Supp. at 1431.

[206] *See id.* at 1430–32.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 1431–32.

[210] *See supra* note 74 and accompanying text; *see also Colorado River Indian Tribes*, 605 F. Supp. at 1431.

and which are potentially subject to Federal control and responsibility" and stated that "[m]ajor reinforces but does not have a meaning independent of significantly."[211]

In addition to returning to the unitary standard because of the CEQ regulations, the *Colorado* court emphasized NEPA's purpose.[212] The court noted that:

> [t]o limit the scope to only 'major' federal involvement, ignoring the potential for significant impact, seems incongruous to the avowed intent of NEPA to maintain environmental quality. It is not the degree of federal involvement that influences the standard of living of our society, but instead the potential and degree of impact from development that bears upon the overall welfare and enjoyment of our society.[213]

As a result of this reasoning, the court returned to the unitary standard as a way of analyzing a small-handle problem. Because the court had adopted the unitary standard, and thus focused its review of the agency's decision on whether the agency reasonably could have concluded that the entire project would have no significant environmental impact, the court held that the EIS should consider the whole project.[214]

The *Colorado River Indian Tribes* court addressed logically the small-handle problem because the court forced decisionmakers to confront the reasonably foreseeable environmental consequences of their actions. In contrast, most courts first would inquire whether federal involvement has federalized an entire project.[215] Only if federal involvement federalized an entire project would a court consider whether the federal involvement was major or if the impact of the project was significant.[216] Intuitively, however, if there is enough federal involvement to federalize a whole project, the federal action would be major. Thus, requiring federalization as a separate identifiable statutory question is essentially redundant to testing whether the federal involvement in the project is "major."[217] Courts considering whether an action is major instead should follow the reasoning of courts that have debated a unitary standard or a dual standard and chosen the unitary

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[211] *Colorado River Indian Tribes*, 605 F. Supp. at 1431 (quoting 40 C.F.R. § 1508.18 (1984)).

[212] *Id.* at 1431–32.

[213] *Id.* at 1432.

[214] *Id.* at 1433.

[215] *See supra* notes 97–183 and accompanying text (discussing various tests courts use to determine whether a project has been federalized).

[216] *See supra* notes 97–98 and accompanying text.

[217] MANDELKER, *supra* note 4, § 8.04(1). Mandelker also notes that this close relationship between a decision on whether an action is "federal" and a decision on "major" makes decisions that concentrate exclusively on the "federal" requirement hard to find. *Id.*

standard.[218] Given that the CEQ regulations have adopted the unitary standard[219] and that only use of a unitary standard fulfills NEPA's goals,[220] courts should return to using the unitary standard when confronted with a small-handle problem.

The wood-chipping installation hypothetical illustrates how illogical the approach currently taken by courts can be.[221] A court faced with this hypothetical would ask whether the permit for the barge-loading facility was sufficient to federalize the entire project. Under the interdependence test,[222] a court could conclude that the wharf-building permit merely serves a complementary function to the wood-chipping installation. Under a but-for test,[223] a court could conclude that, because there are other ways to remove the woodchips, the wharf-building permit is insufficient to federalize the entire project. Finally, utilizing the "links-in-the same bit of chain" analysis,[224] a court could take judicial notice of the fact that other wood-chipping installations had gone forward without a barge-loading facility and conclude that the wood-chipping installation and the building permit were not "links-in-the same bit of chain." Thus, although the impact of the project clearly would be significant, perhaps affecting the biological and climatological character of major portions of several southern states, a court utilizing any of these approaches would avoid any further analysis of the problem. In effect, a court could ignore the unitary standard completely, even though the CEQ regulations have explicitly adopted the unitary approach.[225]

In contrast, a court following the reasoning of *Colorado River Indian Tribes v. Marsh*[226] would note that the project involves federal action and the project's potential impacts are significant. Under the unitary standard that the CEQ regulations mandate, whether the federal involvement is arguably not major is irrelevant, and an EIS would be required.[227]

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[218] *See supra* notes 194–214 and accompanying text (discussing *Colorado River Indian Tribes v. Marsh*, a case where the court utilized the unitary standard to require a comprehensive EIS).

[219] *See supra* note 74 and accompanying text.

[220] *See supra* notes 20–26 and accompanying text (discussing NEPA's goals).

[221] *See supra* notes 1–2 and accompanying text (presenting the wood-chipping hypothetical).

[222] *See supra* notes 109–20 and accompanying text (discussing the interdependence test).

[223] *See supra* notes 121–57 and accompanying text (discussing the but-for test).

[224] *See supra* notes 158–84 and accompanying text (discussing links-in-the-same-bit-of-chain analysis).

[225] *See supra* note 74 and accompanying text.

[226] 605 F. Supp. 1425 (C.D. Cal. 1985).

[227] *See supra* note 74 and accompanying text.

Utilizing the unitary standard is preferable to the current trend by courts to make fact-specific inquiries about whether a project has been federalized from which no clear-cut guidance can be drawn.[228] Indeed, the fact-specific inquiry about whether a project has been federalized seems to be merely another way of utilizing the "dual standard" while rejecting cases that utilized a unitary standard.[229] Moreover, CEQ regulations provide agencies no guidance as to what constitutes "marginal" federal action. Rather, the CEQ notes that adoption of official policy, plans, or programs are categories into which federal actions tend to fall.[230] In addition, the CEQ regulations state that federal action falls within the category of "[a]pproval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities."[231] Finally, a court that considers whether a federal action is "major" rather than "minor" is, in essence, considering the degree of federal participation.[232] The regulations make clear, however, that "major" is to have no meaning independent of the significant environmental effects of a project.[233]

2. Against the Trend: Using Theories of Indirect Effects to Require a Comprehensive EIS

After returning to a unitary standard of analysis, the court in *Colorado River Indian Tribes v. Marsh* also examined the indirect effects of the project.[234] The United States Court of Appeals for the First Circuit, however, began its analysis of a small-handle problem in *Sierra Club v. Marsh*, by considering the indirect environmental effects of a project. In light of the indirect effects of the project that were reasonably foreseeable, the court required a comprehensive EIS.[235] In *Sierra Club*, developers proposed to develop Sears Island, a 940-acre island in Penobscot Bay in Maine.[236] A gravel bar that was

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[228] *See* MANDELKER, *supra* note 4, § 8.06(2).
[229] *See Colorado River Indian Tribes*, 605 F. Supp. at 1431.
[230] 40 C.F.R. §§ 1508.18(b)(1)–(3).
[231] *Id.* § 1508.18(b)(4).
[232] *See* MANDELKER, *supra* note 4, § 8.04(1).
[233] *See supra* note 74 and accompanying text.
[234] Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425, 1433 (C.D. Cal. 1985).
[235] Sierra Club v. Marsh, 769 F.2d 868, 881–82 (1st Cir. 1985).
[236] *Id.* at 872.

exposed only at low tide connected the island to the mainland.[237] The mainland area had been developed for industrial use.[238] The developers had plans in place to build both a causeway that would connect the island to the mainland and a cargo port that would be used to ship lumber and agricultural products.[239] In addition, the Sears Island proposal also included plans to develop an industrial park in the area adjacent to the cargo port.[240] Building the port and causeway required permits from the Corps.[241] The plans for the industrial park were not yet finalized,[242] and the Corps prepared an EA that considered only the causeway and the cargo port.[243]

Then-Judge, now Justice, Stephen Breyer, speaking for a majority of the United States Court of Appeals for the First Circuit, held that an EIS for the planned island development must encompass all three parts of the project.[244] In holding that the EIS also must consider the environmental effects of the proposed industrial development, the court never concluded that the entire project had been federalized.[245] Rather, the court looked to the CEQ regulations, which require an agency to take account of "indirect effects" in preparing an EIS.[246] An agency "need not consider highly speculative or indefinite impacts."[247] Because the proposed development of the industrial plant was part of an integrated plan with the causeway and port, however, the court found that the environmental effects of the industrial port were not merely speculative.[248] In addition, the court pointed out that in the *Forty Most Asked Questions Concerning CEQ's NEPA Regulations*,

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[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *Sierra Club*, 769 F.2d at 872.

[241] *See id.* at 873. Presumably, the Corps's jurisdiction arose from the Clean Water Act.

[242] *Id.* at 872.

[243] *Id.* at 873.

[244] *Id.* at 881–82.

[245] *See Sierra Club*, 769 F.2d at 881–82.

[246] *Id.* at 877–78. *See supra* note 46 and accompanying text for the CEQ definition of "indirect effects."

[247] *Id.* at 878.

[248] *Id.* In holding that the building of the industrial park was not merely speculative, the court noted that the record made it impossible to doubt that building the causeway and port would lead to further development of the island. Local planners considered the port, causeway and industrial park to be components of an integrated plan. *Id.* Second, the plans were precise enough for an agency preparing an EIS to take them usefully into account. *Id.* at 879. Third, the court noted that once the causeway and port were completed, pressure to develop the rest of the island could prove irreversible. Thus, even if federal authorities would have an opportunity to consider the impact of the industrial park at a later date, the decisionmaker would not

the CEQ stated that "[t]he agency can not ignore these uncertain, but probable, effects of its decision."[249]

In addition to considering the CEQ regulations and the answers the CEQ promulgated to common questions, the *Sierra Club* court also looked at the purpose and spirit of NEPA.[250] The court noted that requiring a comprehensive EIS "reflects NEPA's underlying purpose in requiring agencies to determine and assess environmental effects in a systematic way—namely, having decisionmakers focus on these effects when they make major decisions . . . the requirement flows not only from the letter, but also from the spirit, of NEPA."[251] Thus, it appears that the First Circuit, at least, has considered the legislative history of NEPA.[252]

A NEPA commentator summarized the decision of the *Sierra Club* court as a decision based on causation theory.[253] Under causation theory, reasonably foreseeable environmental effects of a project may be considered indirect effects for EA or EIS purposes when there is federal involvement in a project that will cause nonfederal conduct.[254] Furthermore, the commentator argued that what is beneficial about using this theory is that the theory both considers reasonably foreseeable environmental effects of a project and protects Congress's intent to limit NEPA to federal action.[255]

Utilizing the indirect effects approach would eliminate the need to determine whether or not a project has been sufficiently federalized. Two commentators noted that, as between determining whether or not a project has been federalized and considering the secondary or indirect effects of a project under a causation theory, the causation-based theory is a better approach because this analysis more closely follows the NEPA statute, which seeks to regulate federal action that causes significant environmental impacts.[256] Moreover, the causation-based theory of indirect effects is consistent with the CEQ regulations, which state that effects of a project may include effects related

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have a meaningful choice because of the parts of the project that had already been completed. *See id.*

[249] *Id.* (quoting *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations*, 46 Fed. Reg. 18,026, 18,031 (1981)).

[250] *Sierra Club*, 769 F.2d at 882.

[251] *Id.*

[252] *See supra* notes 7–14 and accompanying text.

[253] Ellis & Smith, *supra* note 22, at 10,058 n.29.

[254] *Id.* at 10,058.

[255] *Id.*

[256] *Id.*

to induced changes in the pattern of land use and related effects on air and water and other natural systems, including ecosystems.[257] Finally, the federalization requirement, because no clear-cut guidelines can be drawn from the fact-specific tests utilized by courts, "invites the government to intrude on private decisionmaking . . . and to restrain . . . private conduct over which the government has no authority."[258]

Opponents of the projects in *Winnebago Tribe of Nebraska v. Ray* and in *Ringsred v. Duluth* also argued that, even assuming limited federal involvement, the Corps nevertheless must consider the impacts of nonfederal segments because those impacts were indirect effects of the proposed federal action.[259] In both cases, the courts rejected this argument.[260] A better presentation by the plaintiffs, however, might have changed the courts' final decisions.[261] Merely contending that "bigger is worse" was insufficient.[262] Rather, opponents of a project must convince a court that something different or significant is occurring.[263] In addition, in both cases the opponents of the projects presented the arguments as a backup, and appeared to focus more on the "federalization" requirement.[264] Finally, for this approach to be successful, the timing must be correct.[265] For example, in *Ringsred*, the court stated that the parking ramp project was only in the proposal stage.[266] The court refused to hold that the Secretary should consider as an indirect impact the environmental effects of the parking ramp, reasoning that to do so would place too great a burden on the EA-screening process.[267] In contrast, in *Sierra Club*, the plans for the third part of the project that the court required to be included in the EIS, although not final, were developed.[268]

There are several reasons why using a theory of indirect effects is an important means of fulfilling NEPA's statutory mandate. The value

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[257] *See supra* note 46 and accompanying text.

[258] Ellis & Smith, *supra* note 22, at 10,058.

[259] *See* Ringsred v. Duluth, 828 F.2d 1305, 1308–09 (8th Cir. 1987); Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 273 (8th Cir.), *cert. denied*, 449 U.S. 900 (1980).

[260] *Ringsred*, 828 F.2d at 1308–09; *Winnebago Tribe of Nebraska*, 621 F.2d at 273.

[261] Thatcher, *supra* note 11, at 639.

[262] *See id.* (discussing this idea in the context of theories of cumulative impacts).

[263] *Id.*

[264] *Id.* at 636.

[265] *Id.* at 636–37.

[266] Ringsred v. Duluth, 828 F.2d 1305, 1309 (8th Cir. 1987).

[267] *Id.*

[268] *See supra* note 248 and accompanying text.

of using an analysis based upon indirect effects is that such an analysis acknowledges that proposed federal action causes indirect effects even though the federal government does not directly sponsor subsequent activities.[269] In addition, while with theories of cumulative impacts confusion often arises over whether subsequent nonfederal actions must already be proposed and whether impacts of federal and nonfederal actions are technically cumulative, such confusion is eliminated under an analysis based upon indirect effects.[270] Finally, a theory of connected actions can result in the conclusion that two pieces of a project are not sufficiently connected, i.e. are not "links-in-the same bit of chain," and a comprehensive EIS is not required because each piece could exist without the other.[271] A theory of indirect effects, however, forces the decisionmaker to confront the fact that future development with significant environmental impacts is reasonably foreseeable or likely to result if plans for the first piece of a project are approved.

The wood-chipping hypothetical illustrates how a theory of indirect effects would work.[272] Developers would need the Corps to issue a wharf-building permit in order to ship the woodchips. Developers will build the wood-chipping installation if the Corps issues a wharf-building permit. Building the wood-chipping installation will impact the environment, possibly affecting the biological and climatological character of major portions of several southern states. Even though the potential biological and climatological effects are later in time and farther removed from the construction of the project, the effects are reasonably foreseeable. The CEQ regulations state that the effects may include, as in this case, effects related to induced changes in the pattern of land use and related effects on air and water and other natural systems, including ecosystems.[273] Thus, the Corps should prepare an EIS that considers the effects of the wood-chipping installation on the environment.

When confronted with a small-handle problem, most courts consider whether a project with some federal involvement has been

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[269] Thatcher, *supra* note 11, at 636.

[270] *Id.* Thatcher also notes that such a theory may change the result of a case such as *Enos v. Marsh.* 769 F.2d 1363 (9th Cir. 1985). In *Enos*, the court never discussed a theory of indirect effects, and as a result reached a decision that was called "flatly wrong under NEPA." Thatcher, *supra* note 11, at 636–37.

[271] *See supra* notes 158–84 and accompanying text.

[272] *See supra* notes 234–58 and accompanying text.

[273] *See supra* note 46 and accompanying text.

sufficiently federalized to require a comprehensive EIS. By using either a unitary standard of analysis or a theory of indirect effects, courts could require a comprehensive EIS. The requirement of a comprehensive EIS in such circumstances is consistent with NEPA and the CEQ regulations, and clearly advances NEPA's policy goals.

B. *Requiring a Comprehensive EIS Protects the Integrity of the Decision-making Process*

Protecting the integrity of the decision-making process was clearly an important policy goal of NEPA.[274] Only requiring a comprehensive EIS will protect the integrity of the decision-making process. For example, in *Maryland Conservation Council v. Gilchrist*, a county was planning a highway needed to relieve traffic congestion.[275] Regardless of the exact route of the highway, at some point the highway had to pass through a portion of a state park.[276] With the county's authorization, private developers had begun to develop a route in the vicinity of the park that, if extended through the park, would take three times as much park land as the route preferred by environmental groups.[277] Before the portion of the highway that was to pass through the park could be built, the Secretary of Interior would have to approve of the conversion of park land to uses other than public outdoor recreation.[278] The United States Court of Appeals for the Fourth Circuit held that the highway project constituted major federal action that required an EIS.[279] The court thus ruled that work on any portion of the project could not begin until the agency had prepared an EIS.[280]

In requiring that no work on the project could begin until the agency had completed an EIS, the court reasoned that federal decisionmakers would be improperly influenced if segments of the project were completed before developers sought a permit for the portion of the project that crossed through the park.[281] The court commented

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[274] *See supra* notes 22–25 and accompanying text.

[275] Maryland Conservation Council, Inc. v. Gilchrist, 808 F.2d 1039, 1041 (4th Cir. 1986).

[276] *Id.*

[277] *Id.*

[278] *Id.* at 1042. The court also noted that it was likely that the Secretary of the Army would have to issue a permit to dredge wetlands when the portion of the highway that was to cross through the park was built. *Id.*

[279] *Id.*

[280] *Gilchrist*, 808 F.2d at 1042.

[281] *See id.*

that the completed segments would "stand like gun barrels pointing into the heartland of the park."[282] The court stated that "[n]on-federal actors may not be permitted to evade NEPA by completing a project without an EIS and then presenting the responsible federal agency with a fait accompli."[283]

The small-handle situation is slightly different from the situation faced by the court in *Maryland Conservation*. In *Maryland Conservation*, the federal action was clearly major, while in the small-handle cases that very issue is in dispute. The court's reasoning in *Maryland Conservation* regarding why the other portions of the project must be considered, however, is applicable to small-handle cases. In both cases, nonfederal actors should not be able to complete major portions of projects and later seek a particular permit while presenting the decisionmakers with a "fait accompli."[284] Indeed, in either situation, the nonfederal actor should be prevented from completing a major portion of the project and then seeking any necessary permits. Otherwise, the federal decisionmaker might be unduly influenced by the fact that large portions of the project have been completed and may remain idle until and unless any necessary federal permits are issued.

This argument becomes even more compelling when public opinion supports a project despite potentially significant effects on the environment. For example, in *Sierra Club v. Marsh*, popular opinion supported the development of the island.[285] The development of the island was important to the economic growth of the area, and requiring an EIS that considered construction of an industrial plant would delay the project.[286] The court in *Sierra Club* pointed out, however, that to refuse to consider a certain part of a project because of such concerns would be contrary to the very purpose of NEPA—to require federal agencies to consider such effects.[287]

V. Conclusion

NEPA's language and the CEQ regulations promulgated thereunder appear to require a comprehensive EIS in the context of the

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[282] *Id.*

[283] *Id.*

[284] *See id.*

[285] *See* Sierra Club v. Marsh, 769 F.2d 868, 872 (1st Cir. 1985) (noting that Maine voters had twice approved bonds to finance state's share of costs of project).

[286] *Id.*

[287] *Id.* at 881–82.

small-handle problem. Fact-specific inquiries that consider whether or not a project has been federalized have prevented any uniformity in judicial decisions on the necessity and scope of an EIS when considering small-handle problems. On the positive side, some courts have used the unitary standard or a theory of indirect effects to require a comprehensive EIS and have thereby fulfilled NEPA's goals. Ultimately, requiring a comprehensive EIS is the only means to ensure development and implementation of solutions to the problems that Congress first warned about in 1969.